NO. 78-1215

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1978

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GENE BALL,
Petitioner

v.

BOARD OF TRUSTEES OF THE
KERRVILLE INDEPENDENT SCHOOL DISTRICT,
HENRY H. WIED, MARGARET WATSON,
DAN W. BACON, PAT BRADEN,
EARL A. COCHRANE, MAURICE HAUFLER
AND C. H. BORCHERS, MEMBERS OF THE
BOARD OF TRUSTEES, INDIVIDUALLY
AND IN THEIR OFFICIAL CAPACITIES,
Respondents

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# RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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# RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The respondents, Board of Trustees of the Kerrville Independent School District, Henry H. Wied, Margaret Watson, Dan W. Bacon, Pat Braden, Earl A. Cochrane, Maurice Haufler and C. H. Borchers, members of the Board of Trustees, individually and in their official capacities, pray that the petition of petitioner, Gene Ball, that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit rendered in this case, be denied.

## OPINIONS BELOW

The opinions below are correctly set forth in Appendix A, pages A-1 through A-12 inclusive, of Petitioner's Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

## JURISDICTION

Respondents do not contest jurisdiction of this Court.

## QUESTIONS PRESENTED

Did the United States Court of Appeals for the Fifth Circuit err in affirming the judgment of the United States District Court in dismissing petitioner's (Gene Ball's) suit for reinstatement, said petitioner being an untenured high school teacher?

Respondents, hereinafter referred to as School District, are dissatisfied with petitioner's statement of the question presented.

## STATEMENT OF FACTS

The School District has no disagreement with the synopsis of events occurring on the various dates as set forth in petitioner's petition for writ of certiorari, including all applicable orders and judgments set forth in Appendix A, B and C to his petition.

Although the School District does not disagree with the occurrence of such events, orders and judgments, the School District does not agree with the opinions, conclusions and arguments of petitioner's attorney which are interspersed throughout his Statement of Facts. For example, petitioner (Ball) takes the position that the sole reason his contract was terminated in September, 1969, and the sole reason he was not subsequently reinstated to his teaching position was because he refused to shave a beard.

The School District believes that the following facts are quite important.

It is undisputed that petitioner was a non-tenured teacher, employed under a one-year contract. It is also undisputed, and Ball so admits, that the former school trustees



acted in good faith. On page 4, lines 1-8 of Plaintiff's Exhibit F (Appendix pg. 196), petitioner's attorney states:

> Our position is that the Board has acted in good faith; that they have exercised their best judgment; that Mr. Barr in particular has exercised a professional judgment that Mr. Ball's beard, if he were allowed to teach with it would, in the sense of setting an example, make it more difficult to enforce a policy that the Kerrville Independent School District has that male students who are old enough to shave be clean shaven.

The Court of Civil Appeals of Texas, San Antonio, in the opinion written by Chief Justice Barrow in Ball v. Kerrville Independent School District, 529 S.W.2d 792 (Tex. Civ. App.-1975, San Antonio, error ref'd n.r.e.) at page 794, found that:

> Each of the trustees testified that he or she was more concerned about Ball's insubordination and refusal to cooperate with the superintendent rather than Ball's physical appearance.

## REASONS FOR DENYING THE WRIT OF CERTIORARI

### I

Petitioner alleges seven (7) reasons why this Court should grant a writ of certiorari.

Petitioner asserts that the finding of the United States Court of Appeals for the Fifth Circuit that Mr. Ball failed to raise a substantial federal question conflicts directly with: First, this Court's decision in Kelley v. Johnson, 425 U. S. 238 (1976); Second, two recent decisions of the Fifth Circuit, Lansdale v. Tyler Junior College, 470 F.2d 659 (5th Cir. 1972 en banc) cert denied 411 U.S. 986 and Hander v. San Jacinto Junior College, 519 F.2d 273 (5th Cir. 1975); and Third, three more of this Court's decisions, namely Perry v. Sindermann,

408 U.S. 593 (1972), Board of Regents of State Colleges v. Roth, 408 U.S. 564 and Paul v. Davis, 424 U.S. 693 (1976).

Since petitioner's first three reasons for granting the writ are aimed at the Fifth Circuit Court's finding that Mr. Ball failed to raise a substantial federal question, the School District will respond to all said first three reasons together, for the sake of convenience and brevity.

In sustaining the U.S. District Court's dismissal of petitioner's suit, the Fifth Circuit found that Mr. Ball failed to raise a substantial federal question. The Fifth Circuit also found that petitioner's claim of a violation of a liberty interest under the record of this case was wholly unsubstantiated and frivolous.

The Fifth Circuit found that the two-pronged test of determining whether the federal question involved was wholly insubstantial and frivolous had been fully met, and affirmed the dismissal of the district court.

The two-pronged test is set forth in Southpark Square Ltd. v. City of Jackson, Miss., 565 F.2d 338 (5th Cir. 1978) at page at page 342, as follows:

> [L]ack of substantiality in a federal question may appear either because it is obviously without merit or because its unsoundness so clearly results from the previous decisions of [the Supreme Court] as to foreclose the subject.
> Mays v. Kirk, 414 F.2d 131, 135 (5th Cir. 1969), quoting from California Water Service Co. v. City of Redding, 304 U.S. 252, 58 S.Ct. 865, 867, 82 L.Ed. 1323 (1938).

The employment of Mr. Ball, an untenured high school teached employed under a one-year contract at Tivy High School, was terminated by the School District. Petitioner asserted the reason for termination was his refusal to shave his beard.

Based on the previous decisions of this Court, the Fifth Circuit correctly held that reemployment could be refused, for any reason, or for no reason at all, and, therefore, having no right to reemployment he had no due process right to a hearing



as to the reasons for dismissal.

In Kelley v. Johnson, 425 U.S. 238, 47 L.Ed.2d. 708 96 S.Ct. 1440 (1976) this Court held the hair grooming regulation for county policemen did not violate their Fourteenth Amendment rights. In fact, this Court also upheld the District Court's original judgment of dismissing plaintiff's suit.

In the annotation following the reported decision of Kelley v. Johnson, supra, this Court's views as to concept of a 'liberty' under the due process clauses of the Fifth and Fourteenth Amendments are discussed in 47 L.Ed. 2d 975. From page 996 a portion of such discussion of two of the cases which petitioner says are in conflict with the opinion of the Fifth Circuit are set forth as follows:

> On the other hand, as also held by the Supreme Court, it would stretch the concept of procedural due process too far to suggest that a person is deprived of 'liberty' when he simply is not retained in one job but remains as free as before to seek another. Board of Regents v. Roth (1972) 408 US 564, 33 L.Ed. 2d 548, 92 S. Ct. 2701; Bishop v. Wood (1976, US) 48 L Ed 2d 684, 96 S. Ct. 2074.
>
> The rule last stated is illustrated by the following cases.
>
> A nontenured state university professor who was employed for one year and then was given no reason for his nonretention was held, in Board of Regents v. Roth (1972) 408 US 564, 33 L Ed 2d 548, 92 S Ct 2701, to have no Fourteenth Amendment liberty right entitling him under the due process clause to a statement of reasons for his nonretention and a hearing on the university's decision not to rehire him. Insofar as the professor's interest in 'liberty' was concerned, the court pointed out that he was in no way deprived of such interest, since in declining to re-employ him, the state did not impose on him any stigma or other disability that foreclosed his freedom to take advantage of other employment opportunities. The court also stated that mere proof that a person's record of

> nonretention by a state or state agency in one job might make that person somewhat less attractive to some other employers does not, taken alone, establish the kind of foreclosure of opportunities that amounts to a deprivation of 'liberty' proscribed by the due process clause of the Fourteenth Amendment. Without discussing questions of liberty, Burger, Ch. J., concurred in the judgment, and Douglas, J., dissented. Marshall, J., also dissented, on the ground, among others, that every citizen who applies for a government job is entitled to it unless the government can establish some reason for denying the employment, and that this 'is also liberty--liberty to work,' which is the very essence of the personal freedom and opportunity secured by the Fourteenth Amendment.
>
> Likewise, in Perry v. Sindermann (1972) 408 US 593, 33 L Ed 2d 570, 92 S Ct 2694, the court ruled that the mere showing that a nontenured professor was not rehired in one particular job, without more, did not amount to a showing of a loss of liberty (or property).

Neither Lansdale v. Tyler Junior College, supra, nor Hander v. San Jacinto Junior College, supra, are factually similar to the facts in this case and both were decided before Kelley v. Johnson, supra.

Paul v. Davis, supra, is clearly instructive that petitioner does not have a cause of action against the School District. The plaintiff in the Paul v. Davis Case, supra, was arrested for shoplifting. His name and picture were included in a police flyer of active shoplifters and distributed to merchants. The shoplifting charges were dismissed and plaintiff brought suit alleging his defamation deprived him of liberty protected by the due process clause of the Fourteenth Amendment. The district court dismissed the complaint, and this Court in effect affirmed such dismissal. Mr. Ball's allegations in this case are far removed from any link to a badge of infamy or public scorn. A person's choice to wear or not to wear a beard has no effect on his



ability to earn a livelihood. Mr. Ball was paid every cent, together with interest thereon, due to him as his 1969-1970 employment contract.

II

The School District respectfully responds collectively to petitioner's reasons numbers 4 and 5, and for such response would show this Court that all of the members of the Fifth Circuit Court agree that the district court acted correctly in dismissing the action in question. Different reasoning was used, but the result was the same.

Circuit Judge Godbold in his concurring opinion stated that:

> Ball's claims have been vindicated in state court to the extent they are not patently illusory. (page 1103, unpublished opinion of Fifth Circuit Court in Ball v. Board of Trustees of Kerrville Independent School District, 1978)

It also should be noted that in the Court's opinion in the said Ball Case, supra, at page 1102, the court said:

> State administrative procedures resulted in Ball's being paid his salary in full for the term of his employment. No other or further redress at the hands of the Board of Trustees or its individual members may be had under 42 U.S.C. Sec. 1983, or under any accepted concept of federal constitutional rights.

The decisions of this Court are conclusive of the issues in this case, and the conclusion reached by the Fifth Circuit is in full accord with this Court's decision regardless of the path of reasoning used.

III

Petitioner's reasons numbers 6 and 7 primarily beg the question and are merely extension of the central issue in this case which petitioner is trying to disprove, mainly that Mr. Ball

has not demonstrated that he has any federally protected right which has been violated. It is respectfully submitted that petitioner has failed to raise a substantial federal question.

Ball never made any effort to assert, in any state administrative tribunal or any state court, his claim of right to reinstatement or re-employment either under state law 'in light of' or against the background of a federal constitutional claim.

Ball's Fifth Amended Answer and Cross-Action (Appendix pg. 189) is his final pleading upon which he went to trial on the merits in the state administrative proceeding. A reading of the pleading shows that he deliberately withheld from the state court all consideration on the question of state law concerning reinstatement and re-employment.

A reading of the pleading also shows that the only remedy sought by Ball was payment of salary (money damages) remaining unpaid under his teaching contract for the year 1969-70, together with interest thereon and costs of court, and for a writ of mandamus to compel the school district to pay the same if not duly paid. The only law invoked by Ball was the Texas law that the case be governed by the Texas substantial evidence rule.

Based on the Texas substantial evidence rule, Ball won his appeal, as shown in the reported opinions of Ball v. Kerrville Independent School District, 529 S.W.2d 792 (Tex.Civ. App.-1975, San Antonio, error ref'd n.r.e.). Ball recovered all he asked for, i.e. remaining salary due under the 1969-70 contract, together with interest and costs of court. As Ball put it in his brief, he has been paid down to the last penny all moneys due him under such final judgment.

Ball is asking this Court to speculate with him that he would have been wholly unsuccessful in a Texas state proceeding if he had asked for or claimed any relief or remedy for reinstatement or re-employment even 'in light of' his federal constitutional claims. Ball is asking this Court to judge a judgment that never occurred and never could have occurred because Ball deliberately withheld those claims of reinstatement so as to actually prevent a determination of his claim of reinstatement on the question of state law 'in light of' any federal constitutional claims.

It is undisputed that Ball urged his federal claims during the proceedings before the Texas State Commissioner of Education and the Texas State Board of Education. (See page 794, Ball v. Kerrville Independent School District, 529 S.W.2d 792, supra.)



After the order of June 5, 1970, from the federal district court, Ball intentionally withdrew and withheld his federal claims from consideration in all future state proceedings.

The United States District Court in its Order to Show Cause, May 13, 1970 (Appendix pg. 53) pointed out that the course being pursued by Ball in the state court was contrary to the spirit, if not the letter, of the district court's prior order which contemplated a good faith attempt on the part of Ball of complete the proceedings in state court in an adversary manner.

Ball's representation of his intention not to exhaust his administrative remedies was noted in the district court's Order of Dismissal of June 5, 1970.

Touching only the question of reinstatement by Ball for any year beginning in the school year 1970-71 and each year thereafter, it should be pointed out that there is no record that Ball ever applied for reinstatement and no record of his perfecting any appeal to any authority as a result of being denied reinstatement covering a period of time of some seven (7) years.

The only thing appearing in Ball's brief concerning any appearance before the Board of Trustees is when he said Ball appeared on January 15, 1970 and on February 17, 1970, and that no action was taken at either of these meetings. Ball never perfected any appeal from those two meetings, should he contend that he sought re-employment at those meetings for the coming school year.

In Randell v. Newark Housing Authority, 384 F.2d 151 (3rd Cir. 1967), certiorari denied 383 U.S. 870, 89 S.Ct. 158, 21 L.Ed.2d 138, at page 156, the court said:

> A party cannot refuse to make any use of a system of 'administrative' and 'judicial' relief clearly open to him and thus create a record on which a Federal Court can decide that the party has been denied due process, or that due process safeguards are lacking.

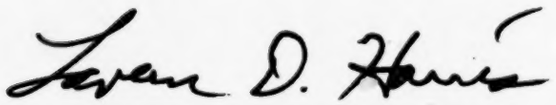
It is pointed out in the court's note 11 at page 156, that the court's decision was not based on the rational of exhaustion of state remedies.

As shown in Lovely v. Laliberte, 498 F.2d 1261 (1st Cir. 1974), res judicata, even in contest of federal civil rights statute, bars all grounds that might have been, but were not presented to a state court.

## CONCLUSION

From the foregoing statement of facts and authorities, the respondents (School District) pray and request this Honorable Court to in all things deny the petitioner's Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit, and for such other and further relief that respondents (School District) may be entitled.

Respectfully Submitted,



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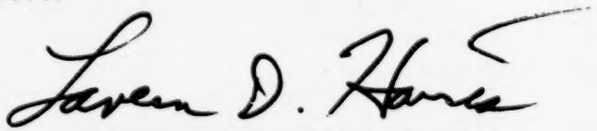
## CERTIFICATE OF SERVICE

I certify that before mailing the foregoing instrument, Respondents' Brief in Opposition to Petitioner's Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit, for filing, that I personally mailed to Joe Mike Egan, Jr., 254 First National Bank Building, Kerrville, Texas 78028, counsel for petitioner, three copies thereof in accordance with Rule 33 of the Rules of the Supreme Court, on the 2nd day of March, 1979.



Lavern D. Harris